LAURENCE A. ANDREN, APPELLANT
WILLIAM J. GREENWALD, APPELLEE

IBLA 71-96 Decided July 24, 1972

Appeal from decision (Worland 131) by district manager, Worland, Wyoming, Bureau of Land Management, dated October 22, 1970, denying appellant's grazing lease application, and granting appellee's grazing application to the extent of the conflict.

Remanded.

Grazing Leases: Generally -- Grazing Leases: Applications -- Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants -- Words and Phrases

A person who owns lands contiguous to public lands, but who has leased all of his "range land" in the county in question, excluding "the approximately 51 acres comprising the home place" to another, under which agreement such other pays to his lessor $9,000 per annum; runs a grazing operation on such lands; utilizes his lessor's livestock; acquires title to the natural increase of such livestock, is entitled to proceeds from the sale of replaced livestock and of calves, except for the proceeds of bulls, and pursuant to the agreement the lessor divests himself of the right of entry and possession of the leased land, is not a qualified preference right claimant since he is not a "lawful occupant of contiguous private land" within the ambit of 43 U.S.C. § 315(m) (1970) and 43 CFR 4121.2-1(c)(1) (1972).

Words and Phrases

The term "lawful occupant of contiguous lands," as used in 43 U.S.C. § 315m (1970) does not include the owner of such lands where, by contract, he has divested himself of control over the grazing operation conducted on such private lands.

Administrative Practice -- Grazing Leases: Preference Right Applicants

Where grazing privileges for certain public lands have been awarded to an asserted preference right claimant, and it is found that he was not entitled to such a

> preference since control of the base lands had been vested by him in another under a contract which has expired, the case will be remanded for readjudication in the light of the existing circumstances.

APPEARANCES: J. D. Fitzstephens, Esq., of Goppert & Fitzstephens, for the appellant; Charles G. Kepler, Esq., of Simpson, Kepler & Simpson, for the appellee.

OPINION BY MR. FISHMAN

Laurence A. Andren has appealed from a decision of the district manager, Worland, Wyoming, of the Bureau of Land Management dated October 22, 1970, which rejected his grazing application and allowed the conflicting application of William J. Greenwald.

The decision of the district manager recited that Greenwald filed an application for renewal of his existing grazing lease, Worland 131, embracing some 861 acres. Andren filed an application for some 420 acres in conflict therewith. The district manager found: that both applicants were qualified preference right claimants; historically the land in conflict has been used and is fenced with contiguous land currently owned by Greenwald; the expired grazing lease was established in 1953; the use of the area in conflict would be supplementary to both Greenwald's and Andren's operations; until March 1, 1971, Greenwald's ranch operation is under a "share-crop" arrangement by written agreement with John Fernandez of Cody, Wyoming; the agreement was entered into due to the fact that Greenwald did not feel able to operate his ranch alone; assignment of grazing lease 131 was not made pursuant to the agreement as Greenwald retained ownership of cattle and replacements; natural increases of the base herd, also branded with Greenwald's brand, became the property of Fernandez in the fall when the calves were sold; although the agreement does not affect "the conflict of lease," arrangements should have been reviewed with the area manager prior to its initiation; it is neither consistent nor in the interest of good range management and operator stability to periodically and continually reapportion the federal lands unless it is obvious that such reapportionment would result in better use of the federal and private lands involved; Andren has not displayed a need greater than that of Greenwald for the lands in issue; and in fact, any additional reapportionment would necessarily reduce, jeopardize, and limit flexibility of an existing operation. Accordingly, the manager held that it was in the interest of good range management and use of federal and preference lands to reject the application of Andren and to allow the application of Greenwald in toto. The district manager also recited that term of the lease and special stipulations would be subject to review as to livestock numbers, and seasons of use as well as review and acceptance by the area manager of the lease agreement with John Fernandez.

The appellant asserts that Greenwald is not a cognizable preference right claimant since he has parted with control of the privately owned lands contiguous to the lands in conflict. He points out that while Greenwald apparently still owns the land, he no longer controls it. His only right other than the right to re-enter and take possession after default was "to enter upon the lease property and to inspect the same at all reasonable times during the term hereof." The appellant argues that Greenwald has not contended that there was a default so that he was not a "lawful occupant of contiguous private lands to the extent necessary to permit proper use of such contiguous lands," as provided in 43 CFR 4121.2-1(c)(1). Therefore, the appellant argues, Greenwald is not qualified as a preference right claimant, thereby suggesting that Andren is the only qualified preference right claimant and accordingly should have been awarded the lands in conflict. The appellant also argues that there are cogent land use factors which dictate the award of the land to Andren, and that Greenwald has violated the regulations pertaining to the lease.

In response, the appellee reaffirms that he "has continued to own at all times since that date" lands which are contiguous to the lands in issue. He states that these deeded lands are not the "farm lands in Diamond Basin" referred to in the Andren appeal. He further states that the so called "farm lands" are not contiguous to the lands included within the lease and are not claimed by Greenwald to be base or preference lands for the lease. The appellee further asserts that the Fernandez lease does not involve the Bureau of Land Management lease or any rights Greenwald might have therein, and does not permit or contemplate that Fernandez will use any of the lands included in the federal lease. He further states that the Fernandez lease was a share-crop arrangement entered into for a short period of time because of the appellee's health, which lease assured the appellee a fixed return on his operation and was so understood by the parties and so found by the district manager.

The crucial issue at bar is the legal effect of the lease agreement entered into by Greenwald with John H. Fernandez. This instrument was executed March 1, 1969. It provided in pertinent portion as follows:

> Lessor does hereby lease unto lessee all of lessor's farm land in Diamond Basin and all of lessor's range land in Park County, Wyoming, but not including the approximately 51 acres comprising the home place. * * *

The lease also embraces the use by Fernandez of 138 cows, 14 yearling heifers, and 9 white-faced bulls, inter alia. The term of the lease is for two years, commencing March 1, 1969, and the lessee obligates himself to pay to the lessor an annual rental of $9,000. Upon termination of the agreement, Fernandez bound himself to return to the

lessor livestock in equal numbers, of an equivalent age as those encompassed within the agreement. The livestock so leased, all natural increases thereof and the replacements provided for were to be branded with the brand of the lessor. The natural increase of the livestock, and any other livestock which Fernandez may own or hereafter acquire would belong to him. The livestock so leased, as replaced by Fernandez from time to time as required, would belong to Greenwald. Proceeds from the sale of replaced livestock and of calves would be paid to Fernandez, except for the proceeds of sale of bulls, which would be paid to Greenwald. He was required to provide 9 bulls both years. The lease further envisaged that Greenwald would pay all property taxes, water assessments, lease rentals, and grazing fees charged against the lease property, and would furnish alfalfa and grass seed and the fertilizer for alfalfa. Fernandez was to pay all operating costs incurred by him in the operation of the lease property.

The agreement further recited that in the event of default, Greenwald has the right to give Fernandez written notice thereof and to terminate the lease if such default is not corrected by Fernandez within 15 days from receipt of notice. Upon such termination, Greenwald could enter and take possession of the lease property, or any part thereof and Fernandez is under obligation to pay to Greenwald all of the latter's costs in so terminating the lease and retaking possession, including reasonable attorney's fees.

Despite the denials to the contrary, the record clearly shows that the lease covers Greenwald's range lands in Park County which is the same county as includes the lands in issue. The language of the lease which states that the lessor shall pay "grazing fees charged against the lease property" affirmatively suggests that the federal lands were included in the agreement.

In Orin L. Patterson et al., 56 I.D. 380, 381 (1938) the Department in discussing the "lawful occupant" provision stated as follows:

> Section 15 of the Act of June 26, 1936 (49 Stat. 1976), provides:
>
> > That preference shall be given owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, * * *.
>
> It is believed that the act contemplates the awarding of preference rights not merely to owners but owners who are occupying the using the contiguous lands for the grazing of livestock. Any

different construction would open the door to owners of contiguous lands to secure leases from the Government and then sublease at a rental in excess of that fixed in the government leases, thus making such leases a medium of speculation by those not in a bona fide occupation of grazing livestock. This view of the meaning of the Act is reflected in paragraph 25(e) of the regulations of April 30, 1937, Circular 1401, Revised, which declares as one of the grounds for cancellation of a lease that:

> If the preference right lessee fails to retain ownership or control of the land tendered as a basis for such preference right * * *

The person or association of persons who, under leases or subleases from Patterson, grazed the contiguous privately owned lands are entitled under the statute to a preference right to a lease of the lands contiguous to that controlled by them and not Patterson or appellants who own no such contiguous land to that which they seek. It is possible that such lessees of Patterson have refrained from making application of lease in reliance on assurances that they would secure the use of the land through arrangement with Patterson.

As was stated in Swan Company v. Alfred and Harold Banzhaf, A ! 24148 (June 18, 1946):

Section 2(c) of the grazing lease provides that the Secretary may "reduce the leased area if it is excessive for the number of stock owned by the lessee;" and both the standard lease form section 3(j) and the regulations (43 CFR, Cum. Supp. 160.26(f)) provides (sic) for the cancellation of the lease if the lessee assigns or subleases all or any part of the leased area without obtaining the approval of the Commissioner of the General Land Office. These provisions plainly contemplate that the lease is intended for the use of the lessee's stock. It is not intended for the use of someone else's stock, or for engaging principally in a pasturing business other than the lessee's own livestock operation. To be sure, the Department has frequently granted leases to applicants who had not at the time had any livestock to graze

> but who supplied reasonable assurance that they would acquire such livestock and use the land for grazing their stock. But, essentially, the applicant must give reasonable assurance that he has in good faith, the intent, the expectation and the financial resources to stock his range and use the land for the purpose of grazing his stock. He may not seek the lease merely to have a greater area with which to produce income derived from other parties, either by way of using the land principally for pasturing other people's livestock or by actually subletting the land. This, of course, does not mean that any instance of pasturing other people's livestock necessarily must result in the denial or cancellation of the lease, nor does it affect leases where the livestock has been pledged as security for a loan; but the practice of pasturing other people's stock may not exceed the incidental. Where such practice is beyond the incidental and is therefore tantamount to a subletting, it must first have the approval of the Commissioner of the General Land Office in the particular instance. [Footnotes omitted].

From a review of the record I am convinced that the agreement between Greenwald and Fernandez probably encompasses not only the preference right lands but also the federally leased lands in conflict. Even assuming, arguendo, that it does not so embrace the lands in conflict, it seems clear that the appellee had divested himself, for the period of the lease, of control of the privately owned lands upon which the preference right claim is predicated. I note in this connection that 43 CFR 4125.1-1(i)(4) (1972) provides as follows:

> The grazing lease will be terminated in whole or in part because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease.

This quotation buttresses our interpretation of what constitutes a lawful occupant of contiguous lands.

However, we note that the agreement 1/ between Greenwald and Fernandez expired on or about March 1, 1971. The record does not

---

1/ Our construction of the agreement rests upon its particular provisions as constituting a divestiture of control over the base lands.

reflect what the current situation is. Accordingly, we deem it appropriate to remand the case to the district manager for a determination whether Greenwald is Now a qualified preference right claimant. If the district manager finds that: (1) the agreement and arrangement between Fernandez and Greenwald have been terminated; (2) Greenwald is now a lawful occupant of contiguous lands, as spelled out in this decision; and (3) Greenwald did not sublet the federal range in issue to Fernandez, the district manager may award the lands in conflict, taking into consideration the factors set forth in 4121.2-1(d)(2) (1972). If, however, Greenwald is found to be an unqualified preference right claimant or a violator of the regulations with respect to his expired lease, the lands shall be allocated to those so qualified, if any such there be.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the case is remanded to the district manager for appropriate action consistent with this decision.

Frederick Fishman
Member

We concur:

Douglas E. Henriques
Member

Joseph W. Goss
Member